

1
2
3
4
5
6
7 GARY F. FISHER,
8 aka BARGER,

9 Plaintiff,

10 v.

11 BARRIOS, et al.,

12 Defendants.
13

14 Case No. [15-cv-00492-WHO](#) (PR)

15
16 **ORDER DENYING MOTION TO**
17 **DISQUALIFY**

18 Dkt. No. 34

19
20 This federal habeas action was dismissed in March 2015 because petitioner Gary
21 Fisher failed to comply with the Court’s order to file a complete application to proceed *in*
22 *forma pauperis* (“IFP”), or pay the full filing fee of \$5.00. Fisher moves to disqualify the
23 presiding judge (Docket No. 34) in this now-closed action. He alleges in conclusory
24 fashion that I am corrupt and have made mistakes. (*Id.* at 1 and 3.)

25 A party may move to disqualify, or recuse, a judge from presiding in a given case.
26 Motions to disqualify fall under two statutory provisions, 28 U.S.C. § 144 and 28 U.S.C.
27 § 455. Because it is not clear which provision Fisher is invoking, I will assume he brought
it under both section 144 and section 455. Section 144 provides for recusal where a party
files a timely and sufficient affidavit averring that the judge before whom the matter is
pending has a personal bias or prejudice either against the party or in favor of an adverse
party, and setting forth the facts and reasons for such belief. *See* 28 U.S.C. § 144.
Similarly, § 455 requires a judge to disqualify himself “in any proceeding in which his

1 impartiality might reasonably be questioned,” 28 U.S.C. § 455(a), including where the
2 judge “has a personal bias or prejudice concerning a party,” *id.* § 455(b)(1).

3 A judge finding a § 144 motion timely and the affidavits legally sufficient must
4 proceed no further and another judge must be assigned to hear the matter. *United States v.*
5 *Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). Where the affidavit is not legally sufficient,
6 however, the judge at whom the motion is directed may determine the matter. *See id.* at
7 868 (holding judge challenged under § 144 properly heard and denied motion where
8 affidavit not legally sufficient).

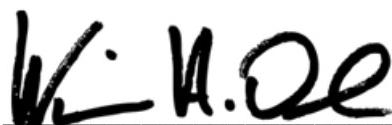
9 The substantive test for personal bias or prejudice is identical under §§ 144 and 455.
10 *See Sibla*, 624 F.2d at 868. Specifically, under both statutes recusal is appropriate where
11 “a reasonable person with knowledge of all the facts would conclude that the judge’s
12 impartiality might reasonably be questioned.” *Yagman v. Republic Ins.*, 987 F.2d 622,
13 626 (9th Cir. 1993) (citation omitted). Consequently, an affidavit filed under § 144 will
14 raise a question concerning recusal under §§ 455(a) and (b)(1) as well. *Sibla*, 624 F.2d at
15 867.

16 Fisher’s allegations do not show that a reasonable person would conclude that my
17 impartiality might reasonably be questioned. His statements are conclusory. He provides
18 no details (let alone evidence) regarding my alleged corruption or mistakes. Without
19 providing specific facts to support his allegations, his motion to disqualify is insufficient as
20 a matter of law and is therefore DENIED.

21 The Clerk shall terminate Docket No. 34.

22 **IT IS SO ORDERED.**

23 **Dated:** October 14, 2015



WILLIAM H. ORRICK
United States District Judge